

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

February 15, 2002 Session

**SOUTHEAST DRILLING AND BLASTING SERVICES, INC. v. HU-MAC
CONTRACTORS, LLC, ET AL.**

**Appeal from the Chancery Court for Davidson County
No. 98-3066-III (Part I) Irvin H. Kilcrease, Jr., Chancellor**

No. M2001-00635-COA-R3-CV - Filed September 4, 2003

This case comes to the Court by an appeal from the Chancery Court of Davidson County. Southeast Drilling and Blasting Services, Inc., hereinafter referred to as "Southeast", brought suit against Hu-Mac Contractors, LLC, Hu-Mac Contractors, Fieldstone Homes, LLC, d/b/a Hu-Mac Contractors, hereinafter referred to as "Hu-Mac", and FVN, LLC for breach of contract. At trial, Southeast stipulated the only party they dealt with was Hu-Mac Contractors, LLC. After a two day bench trial, the Chancellor entered a judgment against Hu-Mac finding there was an unsigned written contract between the parties. The Chancellor determined Southeast was entitled to its lost profits, prejudgment interest, and attorneys fees pursuant to the Prompt Pay Act of 1991 (TCA §§66-34-101, et seq.). After a review of the record, this Court reverses the Trial Court in part and affirms it in part and remands to the Trial Court for action consistent with this Opinion.

**Tenn. R. App. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part;
Reversed in Part; and Remanded**

JEFFREY F. STEWART, SP. J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S. and WILLIAM B. CAIN, J., joined.

Timothy W. Burrow, Nashville, Tennessee, for the appellee, Southeast Drilling and Blasting Services, Inc.

Brigid M. Carpenter, Nashville, Tennessee, for the appellants, Hu-Mac Contractors, LLC, et al.

OPINION

Hu-Mac was the general contractor of a development project known as Forest Cove in Davidson County. Hu-Mac solicited a bid for blasting and drilling services from Southeast. Mack Garvin on behalf of Southeast submitted a proposal to Hu-Mac by letter dated May 4, 1998. Bric McIntosh reviewed this proposal on behalf of Hu-Mac. Sometime after May 4, 1998, Mr. Garvin and Mr. McIntosh met at a Shoney's restaurant to discuss Southeast's

proposal. Each item of Southeast's proposal was discussed and some changes to the initial proposal were made. At trial there was a sharply disputed issue over whether all of the terms were agreed upon. Southeast produced its copy of the terms resulting from the meeting at Shoneys. Mr. McIntosh does not dispute that Mr. Garvin made notes during the meeting but does not believe he reviewed them. Mr. McIntosh was unable to produce any notes he made prior to or during this meeting. Neither party signed Southeast's notes from the meeting. Southeast later incorporated these terms into an AIA (American Institute of Architect) contract form between subcontractors and contractors. This was submitted to Hu-Mac for its signature. This document was signed by Southeast, but it was never signed by Hu-Mac. Even though no document was signed by either Hu-Mac or Southeast, Bric McIntosh acknowledged at trial the parties agreed on enough points so they could get started. At this point in time, Hu-Mac had not discussed the blasting and drilling contract with any other subcontractor.

Southeast contends the contract terms called for it to drill and blast three thousand feet of roadway, thirty five feet wide and seven feet deep. It also provided for water and sewer services outside of the roadway to be blasted, for extra depth for main sewer line and utilities exceeding seven feet in depth, a detention pond, pre-blast surveys and monitoring of the blast. There were to be deductions if the roadway was void of rock and if no water was encountered in blasting the detention pond. The amount to be charged for these services was set forth in the contract and contained no other terms except the work to be done, the amount to be paid, and the location of the work to be done. At trial, Hu-Mac, through Bric McIntosh, took the position only the roadway was agreed upon and that Southeast could only work until a final contract was worked out.

There are certain dates after the meeting at Shoney's that are important to this dispute. On June 8, 1998 Mr. Garvin and Mr. McIntosh and a representative of Sauls Engineering met to discuss the pre-blast surveys and monitoring necessary for Southeast to begin work. Mr. McIntosh agreed to let this work begin. On or about June 18 or 19, 1998, Mr. McIntosh asked Mr. Garvin to get a drilling rig on the construction site to impress the owners who were coming to visit. Mr. Garvin could not meet this request because of prior work commitments, but he had a drilling rig on site by Monday June 22, 1998. Mr. McIntosh complimented Mr. Garvin for such prompt action by a fax dated June 23, 1998. Unfortunately, the movement of the drilling rigs resulted in mechanical break downs. On June 23, 1998 both of Southeast's drilling rigs were on location, but neither rig was operable. The proof at trial establishes this is not an uncommon occurrence. One rig was repaired that day but the other was not repaired until Friday or Monday because a part had to be ordered. On June 24, 1998, Southeast received its blasting permit from the fire marshal. Southeast began drilling but ran out of fuel. Southeast relied on a third party to deliver its fuel. Little drilling and no blasting occurred on this date. On June 25, 1998, Southeast was notified by the fire marshal, due to complaints from a Councilman, they would be required to distribute flyers regarding blast warning information to the neighbors before blasting could begin. This had never happened to Southeast before and delayed blasting while the flyers could be prepared and handed out. On June 26, 1998 Southeast handed out flyers to the fifty or so neighbors. This delayed blasting until Monday June 29, 1998. During all of this week Southeast had problems with workers and equipment. On Saturday June 27 Southeast planned to do drilling but again a worker failed to report to work. On Monday June 29, 1998 Southeast moved additional workers and had both drilling machines working. On this

same day Hu-Mac notified Southeast they were being terminated. They were allowed to finish the day and were told they could work through July 3, 1998. On June 28, 1998 Hu-Mac contacted Explosive Engineering (Explosives) to make a proposal to drill and blast the roadway. Explosives submitted its proposal on June 29, 1998 and it was signed June 30, 1998 by Hu-Mac. Explosive was to begin work on July 6, 1998. Southeast continued to work on June 30, 1998 by blasting 79 holes. On July 1, 1998 they drilled and blasted 48 holes before being ordered off the premises at mid day by Hu-Mac superintendent, Tommy Head. Hu-Mac stated time was of the essence to their contract with Southeast. It was because of poor performance and slow work and a concern that the poor performance of Southeast might slow down the whole project that led to the decision by Hu-Mac to terminate Southeast.

Mr. Garvin testified he had allowed for 45 days to drill and blast that included 4.5 days lost due to break downs and delays in submitting his contract proposal. He felt they were not behind schedule in spite of a slow start. Southeast's replacement worked for 7 weeks to complete the job. Neither of the agreements between Hu-Mac and Southeast or Explosive had a completion date or work schedule nor was any verbally communicated to either. Mr. Garvin testified the rate of Southeast Drilling and Blasting after they began was equal to or better than the replacements rate. Mr. Garvin testified no complaint was made regarding the quality of work Southeast performed.

STANDARD OF REVIEW

In this non-jury case, our review is de novo upon the record of the proceedings below, but the record comes to us with a presumption of correctness that we must honor unless the preponderance of the evidence is otherwise. Rule 13 (d), T.R.A.P. See also, Rice v. Rice, 983 S.W.2d 680 (Tenn. Ct. App. 1998). Our search for the preponderance of the evidence is tempered by the principal that the trial court is in the best position to assess the credibility of the witnesses; accordingly, such credibility determinations are entitled to great weight on appeal. Massengale v. Massengale, 915 S.W.2d 818 (Tenn. Ct. App. 1995), Bowman v. Bowman, 836 S.W.2d 563 (Tenn. Ct. App. 1991), Rice, 983 S.W.2d 680. In fact, this court has noted that "on an issue which hinges on witnesses credibility, (the trial court) will not be reversed unless, other than the oral testimony of the witnesses, there is found in the record clear, concrete and convincing evidence to the contrary". Tennessee Valley Kaolin v. Perry, 526 S.W.2d 488 (Tenn. Ct. App. 1974), Rice, 983 S.W.2d 680.

ANALYSIS

I

HU-MAC CONTENDS THE TRIAL COURT ERRED IN FINDING THAT EXHIBIT 3 CONSTITUTES A BINDING WRITTEN AGREEMENT BETWEEN HU-MAC AND SOUTHEAST.

It is well established in Tennessee that, in order to be enforceable, a contract must represent mutual assent to its terms, be supported by sufficient consideration, be free from fraud and undue influence, be sufficiently definite, and must not be contrary to public policy. T.R.

Mills Contractors v. W.R.H. Enterprises, 93 S.W.3d 861 (Tenn. Ct. App. 2002), Johnson v. Central National Insurance Company, 210 Tenn. 24, 356 S.W.2d 277 (1961). Such a contract can be expressed or implied, written or oral. T.R. Mills Contractors, 93 S.W.3d 861. A written contract does not have to be signed to be binding on the parties. Remco Equipment Sales, Inc. v. Manz, 952 S.W.2d 437 (Tenn. Ct. App. 1997). T.R. Mills Contractors, 93 S.W.3d 861. What is critical is the mutual assent to be bound. In determining mutuality of assent, the courts use an objective standard based on the manifestations of the parties. In recognizing this objective standard the courts have stated;

[I]t is quite true that contracts depend upon the meaning which the law imputes to other instances, not what the parties actually intended; but, in ascertaining what meaning to impute the circumstances the words are used is always relevant and usually indispensable. The standard is what a normally constituted person would have understood them to mean, when used in their actual setting.

Higgins v. Oil Chemical, Chemical and Atomic Workers International Union, 811 S.W.2d 875 (Tenn. 1991)(quoting New York Trust Co. v. Island Oil and Transport Corporation, 34 F.2d 655, 656 (2nd Cir. 1929)).

Assent can be established by the course of dealing of the parties. Remco Equipment, 952 S.W.2d 439. In the trial court's ruling the Chancellor adopted the findings of facts submitted on behalf of Southeast. It is clear by adopting the facts submitted on behalf of Southeast the court resolved the questions and credibility between the two primary witnesses in this case, the trial court found from the acts of the parties and the testimony of Mr. Garvin and Mr. McIntosh, that trial Exhibit 3 was a binding written contract the parties intended to carry out without further formal execution. There may have been other terms not agreed to such as the AIA contract form contained. Therefore, this court cannot find sufficient reason to reverse the presumption of correctness of the trial courts ruling on the facts. Further, this court sustains the decision of the trial courts application of the law in holding that trial Exhibit 3 was the written binding contract between the parties.

II

THE TRIAL COURT ERRED IN FINDING THAT HU-MAC WRONGFULLY TERMINATED SOUTHEAST.

In terminating a contract the contracting party may terminate the contract when the other party (1) is wholly unable to complete the contract, City of Bristol v. Bostwick, 146 Tenn. 205, 240 S.W. 774 (1922); McClain v. Kimbrough Construction Company, Inc., 806 S.W.2d. 194 (Tenn. Ct. App. 1990); (2) manifests an intent to abandon the contract, Brady v. Oliver, 125 Tenn. 595, 147 S.W. 1135 (1911); McClain, 806 S.W.2d 194; (3) manifests an intent to no longer be bound by the contract, Church of Christ Home for Aged, Inc. v. Nashville Trust Co., 184 Tenn. 629, 202 S.W.2d 178 (1947), McClain, 806 S.W.2d 194; or (4) commits fraud on the party seeking to terminate the contract. W.F. Holt Company v. A & E Electric Co., 665 S.W.2d. 722, (Tenn. App. 1983), McClain, 806 S.W.2d 194. The record in this case contains no proof that Southeast was unable to complete, or manifested any intent to abandon the contract,

intended to no longer be bound by the contract, or committed any fraud. The sole purpose advanced by Hu-Mac for terminating Southeast was for its failure to timely complete the contract. Hu-Mac contended at trial time was of the essence. The trial record indicates there were no work schedules or time requirements placed in the contract between the parties nor were any time schedules or time requirements placed in the contract of Southeast's replacement on the job. The record indicates Southeast was drilling and blasting at a rate equal to or greater than its successor at the time it was discharged. The well established rule in contract law is when no definite time for performance of the contract is specified, the law will imply a reasonable time under the circumstances in contemplation by both parties at the formation of the contract. Minor v. Minor, 863 S.W.2d 51 (Tenn. Ct. App. 1993). The record seems clear that there was nothing unreasonable about the actions of Southeast. Southeast's work schedule appears to have been reasonably calculated to complete the contract within the time contemplated by the parties. The court could conclude from the evidence presented that Southeast would have completed this contract in a reasonable time. Therefore this court cannot sustain Hu-Mac's contention on this point.

III

THE TRIAL COURT ERRED IN AWARDING SOUTHEAST LOST PROFITS FOR DRILLING AND BLASTING OF THE DETENTION POND.

In this case, Southeast was a subcontractor working for the general contractor, Hu-Mac. A subcontractor may sue the contractor for damages when the contractor improperly terminates the contract after the subcontractor has partially performed, and the proper measure of damages in that situation is the net profits the subcontractor would have made had it been permitted to complete the contract. McClain, 806 S.W.2d 194. When lost profits are the proper measure of damages, they need only be proved with reasonable certainty and not with mathematical precision. Id. The courts of this state have determined three formulas for which to calculate the subcontractor's net profits:

The contract price (or as much as remains unpaid) less the amount that it would cost the builder to complete the job. This is the simplest and, where the builder can prove with reasonable certainty the cost of completing, the best. (2) The profit on the entire contract (total contract price less total builder's cost of construction, both expended and to be expended) plus the cost of the work performed. (3) For the work done, such proportion of the contract price as the cost of the work done bears to the total cost of doing the job, plus, for the work remaining, the profit that would have been made upon it.

Id. at 200-01.

It is clear from the trial court record the trial court applied the formula of computing the contract price less the amount it would cost the builder to complete the job. The testimony of Mr. Garvin on behalf of Southeast showed he had calculated the cost of each and every item involved in calculating the costs of the price of the contract. In determining the total price of the contract after figuring all of his costs he added a figure of 40%. A 40% profit would be on the

high end of profits made in the drilling and blasting business. Mr. Lueke testified on behalf of Explosive Engineering, the successor to Southeast on this job, the normal profits range from 15 and 25% and that occasionally 40% can be obtained. Mr. Garvin testified he figures bids on the basis of a 40% profit. The court properly allowed this amount in figuring the damages. However, the court also allowed for a profit on the construction of a detention or retention pond referred to in the contract. The proof at trial clearly shows the detention or retention pond did not require any drilling or blasting in order to be completed. This happened because the owner of the project changed the configuration of the pond. This change was not within the control of Hu-Mac and its contract with Southeast could not exceed its contract with the owner. For the Plaintiff to be paid under the terms of the contract, he would have to drill and blast for the creation of this detention or retention pond. Therefore, the trial court is upheld on all aspects of computing damages with the exception of the detention or retention pond. We find there is sufficient evidence to reverse the award for judgment of lost profits for the detention or retention pond. We find the record also clearly reflects Mr. Garvin referred to profits and gross profits throughout the testimony at the trial. Whatever words he may have used, Mr. Garvin was clear in meaning profits were what was left after all costs were deducted. We make no distinction in what words he used because in determining the damages the trial court followed the measure of damages set forth in the McClain case and this is the applicable standard.

IV

THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES TO SOUTHEAST UNDER THE PROMPT PAY ACT.

The Prompt Pay Act is found at T.C.A. §§66-34-101 et seq. The provisions applicable to this case are T.C.A. §66-34-301-304 and T.C.A. §66-34-601-602. T.C.A. §66-34-301 entitles a subcontractor to payment from a contractor in accordance with the provision of the subcontractor's written contract. Without qualification, this code section requires a written contract. The trial court found an existence of a written contract and this court has affirmed such a finding. T.C.A. §66-34-302 states when the subcontractor has performed in accordance with the provision of the written contract with the contractor, the contractor shall pay the subcontractor within the time provided in the contract the full amount received by the contractor for the subcontractors work. Further such payment should be made in a timely fashion. T.C.A. §66-34-303 and 304 do not have application to the facts of this case and there will be no need to discuss them.

Part six of the Prompt Pay Act provides for remedies for delinquent payment or non payment. T.C.A. §66-34-602 prescribes the procedure for seeking relief under the Prompt Pay Act. T.C.A. §66-34-602 (a)(1) and (2) require the party seeking payment to give notice to the party failing to make payment of the provisions of the Prompt Pay Act, their intent to seek relief under the Prompt Pay Act and such notification must be by registered or certified mail return receipt requested. The Plaintiff complied with these requirements, and it was uncontested at the trial and appellate courts. T.C.A. §66-34-602(a)(3) requires notification that if the party does not pay within 10 calendar days of the receipt of the notice or provide an adequate legal reason for failure to make payment the notifying party may seek relief in the Chancery Court. This requirement has been met by the Plaintiff and is undisputed at trial and on appeal.

Since this court has held there is a valid written contract between the parties, and proper notice as required by the Prompt Pay Act was given, we now turn our attention to the second requirement of the Prompt Pay Act. T.C.A. §66-34-602(b) allows the prevailing party to recover reasonable attorneys fees against the non prevailing party providing there is a showing the non prevailing party has acted in bad faith. This is the second half of Hu-Mac's argument on appeal as grounds for this court to deny the award of attorney's fees. In their brief's counsel for Hu-Mac and Southeast were unable to find any cases defining bad faith under the Prompt Pay Act. In determining what is bad faith in this case the court has reviewed a number of cases and finds the case of McClain v. Kimbrough Construction Company, Inc., 806 S.W.2d 194 (Tenn. Ct. App. 1990) as insightful and instructive on facts and issues similar to the ones in this case. In that opinion the court dealt with a contract that left certain pertinent provisions out and dealt with the dismissal of a subcontractor by the contractor for what the contractor believed was slow and poor work. The McClain court found the contracting parties should endeavor to define their respective rights and obligations precisely. See V.L. Nicholson Company v. Transcon Inv. & Fin. Ltd., 595 S.W.2d 474 (Tenn. 1980); Forrest, Inc. v. Guaranty Mortgage Company, 534 S.W.2d 853 (Tenn. Ct. App. 1975). As a practical matter, however, contracting parties are not always precise and frequently leave material provisions out of their contracts. In these situations, the courts impose obligations on contracting parties that are reasonably necessary for the orderly performance of the contract.

For example, we have required contracting parties to deal with each other fairly and in good faith, even though these duties were not explicitly embodied in their contract. Williams v. Maremount Corporation, 776 S.W.2d 78 (Tenn. Ct. App. 1988); TSC Industries, Inc. v. Tomlin, 743 S.W.2d (Tenn. Ct. App. 1987). We have also held the extent of contractual obligations should be tempered by a "reasonableness" standard. Moore v. Moore, 603 S.W.2d 736 (Tenn. Ct. App. 1980). In the construction context, we have imposed upon contractors the obligation to give their subcontractors a reasonable opportunity to perform. Foster & Creighton Company v. Wilson Contracting Company, 579 S.W.2d 422 (Tenn. Ct. App. 1978). The McClain court goes on to say:

[D]espite the importance of notice, contracting parties frequently fail to include express notice provisions in their agreements. See 6 S. Williston, A Treatise on the Law of Contracts § 887B (3d ed. 1962). Notice ought to be given when information material to the performance of a contract is within the peculiar knowledge of only one of the contracting parties. In the absence of an express notice provision, the court will frequently imply an obligation to give notice as a matter of common equity and fairness. 3A A. Corbin Corbin on Contracts § 725 (1964). Requiring notice is a sound rule designed to allow the defaulting party to repair the defective work, to reduce the damages, to avoid additional defective performance, and to promote the informal settlement of disputes. Pollard v. Saxe & Yolkes Development Company, 12 Cal3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974).

McClain, 806 S.W.2d at 198.

In consideration of the McClain case holding, the facts in this case indicate Hu-Mac failed to deal in good faith, common fairness, common equity and fairness with Southeast by discharging them 7 days after they moved on the premises and long before the contract deadline would have to be met. Further, there is no evidence at trial the quality of the work performed by Southeast was below industry standard. The record further indicates rather than give Southeast an opportunity to avoid additional defective performance Hu-Mac chose to meet with and hire a new contractor to replace Southeast. Once this contract was made with Explosives, Southeast was summarily dismissed. This court finds this together with the adopted facts of the trial court as sufficient grounds to determine there was bad faith exercised on behalf of Hu-Mac. Therefore this court sustains the trial court's award of attorney's fee to Southeast.

Hu-Mac has also objected to the award of interest to Southeast. The Prompt Pay Act, T.C.A.66-34-601 provides for the payment of interest. It states "any payment not made in accordance with this chapter shall accrue interest, from the date due until the date paid, at the rate of interest for delinquent payments provided in written contract. This section was amended in the year 2000 to include the provision that if no interest is provided in the written contract interest shall be paid as provided in T.C.A. §47-14-121. Since this had not been enacted by the time of trial the provisions enacted in 2000 would be inapplicable.

It is without question this contract does not provide for an interest rate. However, in reviewing the trial courts memorandum, the adoption of Southeast's findings of fact and conclusions of law in the final order is not clear the trial court awarded interest under this provision. Instead, it would appear the court could equally have awarded prejudgment interest as provided in T.C.A. §47-14-123. It states as follows:

Prejudgment interest, i.e., interest as an element of, or in the nature of, damages, as permitted by the statutory and common laws of this state as of April 1, 1979, maybe awarded by courts or juries in accordance with the principles of equity at any rate not in excess of a maximum effective rate of 10% per annum; provided, that with respect to contracts subject to § 47-14-103, the maximum effective rates of prejudgment interest so awarded shall be the same as set by that decision for the particular category of transaction involved. In addition, contracts may expressly provide for the imposition of the same or a different rate of interest to be paid after breach or default within the limits set by § 47-14-103.

T.C.A. §47-14-123.

The power to award prejudgment interest has been consistently viewed as an equitable matter entrusted to the judge's discretion. The case of Myint v. Allstate Insurance Company, 970 S.W.2d 920 (Tenn. 1998) provides some guidance to this court on whether an award for prejudgment interest by the trial judge was appropriate. This case among other things stated as follows:

An award of prejudgment interest is within the sound discretion of the trial court and the decision will not be disturbed by an appellate court unless the record reveals a manifest and palpable abuse of desecration. Spencer v. A-1 Crane

Service, Inc. 880 S.W.2d 938, (Tenn. 1994) Otis v. Cambridge Mutural Fire Insurance Company, 850 S.W.2d 439, (Tenn. 1992). This standard of review clearly vests the trial court with considerable difference in the prejudgment interest decision. Generally stated, the abuse of discretion standard does not authorize an appellate court to merely substitute its judgment for that of the trial court. Thus, in cases where the evidence supports the trial courts decision, no abuse of discretion is found.

Myint, 970 S.W.2d at 927.

The court in the Myint case goes on to give further guidance:

Several principles guide trial courts in exercising their discretion to award or deny prejudgment interest. Foremost are the principles of equity. T.C.A. § 47-14-123. Simply stated, the court must decide whether the award of prejudgment interest is fair, given the particular circumstances of the case. In reaching an equitable decision, a court must keep in mind that the purpose of awarding the interest is to fully compensate a plaintiff for the loss of the use of funds to which he or she was legally entitled, not to penalize a defendant for wrongdoing. Mitchell v. Mitchell, 876 S.W.2d 830 (Tenn. 1994); Otis, 850 S.W.2d at 446.

Id.

In addition to the principles of equity, two other criteria have emerged from Tennessee common law. The first criterion provides that prejudgment interest is allowed when the amount of the obligation is certain or can be ascertained by a proper accounting, and the amount is not disputed on reasonable grounds. Mitchell, 876 S.W.2d 830, 832 (Tenn. 1994). The second provides that interest is allowed when the existence of the obligation itself is not disputed on reasonable grounds. Id. The Myint decision goes on to say these criteria have not been used to deny prejudgment interest in every case where the defendant reasonably disputes the existence or amount of an obligation. The Myint case goes on to hold that if the existence or amount of an obligating is certain this fact will help support an award of prejudgment interest as a matter of equity.

The facts in this case have been determined to support a claim for bad faith against Hu-Mac. Further, we have already held damages were reasonably certain or reasonably ascertainable based upon the contract terms. Finally, it is clear that Hu-Mac failed to pay or tender payment to Southeast for the work performed where the amount was certain. Therefore this court can find no abuse of discretion on the part of the trial court for awarding prejudgment interest.

THE TRIAL COURT ERRED IN REFUSING TO AWARD DAMAGES PURSUANT TO ITS COUNTERCLAIM.

The court in having determined all other issues in favor of Southeast further finds no evidence in the record to support a claim for consequential damages by Hu-Mac. The record clearly indicates Hu-Mac breached the contract by terminating Southeast.

For the reasons set forth in this opinion the judgment of the trial court is reversed in part as to the award of damages and interest for the building of the detention or retention pond. In all other respects judgment of the trial court is affirmed and the matter is remanded to the trial court for such action as is consistent with the ruling of this court. We tax the costs of this appeal to the Appellants.

JEFFREY F. STEWART, JUDGE